

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIAN G. McNAMEE,

Plaintiff,

- against -

WILLIAM ROGER CLEMENS,

Defendant.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ APR 22 2009 ★

BROOKLYN OFFICE

Case No. 09-1647

NOTICE OF REMOVAL

JOHNSON
POLLAK, PLLC

**TO THE HONORABLE JUDGES OF UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendant William Roger Clemens hereby files this Notice of Removal of the above-described action to the United States District Court for the Eastern District of New York, from the New York Supreme Court for Queens County, New York, where the action is now pending, and respectfully avers and shows as a basis for this Notice of Removal as follows:

THE PARTIES

1. Plaintiff is Brian G. McNamee, hereinafter "McNamee." Defendant is William Roger Clemens, hereinafter "Clemens." Ex. 1.
2. On December 12, 2008, McNamee commenced an action for libel, slander, intentional infliction of emotional distress, negligence, intentional tort, and prima facie tort against Clemens in *Brian McNamee v. William Roger Clemens*, in the Supreme Court of the State of New York, County of Queens, No. 29813-08 (hereinafter the "Civil State Court Action"). Ex. 1.
3. An individual working at Mr. Clemens's house, Melvin Atunez, received a Summons with Notice on March 23, 2009. Ex. 2.

4. Pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(b), and in compliance with 28 U.S.C. § 1446 and Local Civil Rule 81.1, Clemens timely removes the Civil State Court Action.

5. Removal to the United States District Court for the Eastern District of New York, Brooklyn Division, is proper because:

- (i) McNamee is and was a citizen of New York at the time of this removal and at the time the Civil State Court Action was filed (Ex. 1; Ex. 4);
- (ii) Clemens is and was a citizen of Texas at the time of this removal and at the time the Civil State Court Action was filed (Ex. 2; Ex. 3; Ex. 4);
- (iii) the district courts of the United States have original subject matter jurisdiction (diversity) of this action because: (a) this is a civil action between citizens of different states; and (b) the matter in controversy exceeds the sum or value of \$75,000.00 exclusive of interest and costs. Diversity jurisdiction exists and existed both at the time of this removal and at the time the Civil State Court Action was filed (Ex. 1);
- (iv) This notice of removal is being filed within 30 days after Mr. Atunz received the Summons with Notice (Ex. 2); and
- (v) the United States District court for the Eastern District of New York, Brooklyn Division, is the district court of the United States for the district and division embracing the place where the Civil State Court Action was filed.

28 U.S.C. § 1332(a); 28 U.S.C. § 1441(a); 28 U.S.C. § 1441(b); 28 U.S.C. § 1446(a); 28 U.S.C. § 1446(b).

Statement of Grounds for Removal

A. **Civil Action between Citizens of Different States**

6. At the time of this removal and at the time the Civil State Court Action was filed, Clemens is and was a citizen of Texas and resided at 11535 Quail Hollow Lane, Houston, Texas 77024. Ex. 2; Ex. 3; Ex. 4. At the time of this removal and at the time the Civil State Court

Action was filed, McNamee is and was a citizen of New York and resided at 115 Rockaway Point Boulevard, Rockaway Pt., New York 11697. Ex. 1; Ex. 4.

B. Matter in Controversy Exceeds \$75,000.00 Exclusive of Interest and Costs

7. McNamee is plainly seeking in excess of \$75,000.00 from Clemens exclusive of interest and costs because his Summons with Notice avers that he will seek a judgment for \$10,000,000 if Clemens defaults. Ex. 1.

C. Original Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1332(a)/Removal Proper Pursuant to 28 U.S.C. §§ 1441(a) and 1441(b)

8. Because this civil action is between citizens of different states and the matter in controversy exceeds \$75,000.00 exclusive of interest and costs, district courts of the United States have original subject matter jurisdiction of this action. 28 U.S.C. § 1332(a). Thus, removal is proper under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(b).

Timely Removal

9. This notice of removal is being filed on April 22, 2009 –30 days after Mr. Atunez received McNamee's Summons with Notice. Thus, this notice of removal is timely. 28 U.S.C. §1446(b).

Attachments

10. Pursuant to 28 U.S.C. § 1446(a) and Local Rule 81.1, Clemens attaches copies of the following:

Exhibit 1: Summons with Notice filed in *Brian McNamee v. William Roger Clemens*, in the Supreme Court of the State of New York, County of Queens, No. 29813-08, on December 12, 2008

Exhibit 2: Affidavit of Service by Roxie Briggs filed in *Brian McNamee v. William Roger Clemens*, in the Supreme Court of the State of New York, County of Queens, No. 29813-08, on April 1, 2009

Exhibit 3: Affidavit of Service by Jess Lee filed in *Brian McNamee v. William Roger Clemens*, in the Supreme Court of the State of New York, County of Queens, No. 29813-08, on April 1, 2009

Exhibit 4: Defendant Brian McNamee's Notice of Removal filed in *William Roger Clemens v. Brian McNamee*, In the United States District Court for the Southern District of Texas, Houston Division, No. 08-471, on February 11, 2008.

11. The judge has signed no other orders in the Civil State Court Action.

Notice to Adverse Parties/Filing with Clerk of State Court

12. Pursuant to 28 U.S.C. § 1446(d) and promptly after the filing of this notice of removal, Clemens is giving written notice of this notice of removal to all adverse parties, and Clemens is filing a copy of this notice of removal with the clerk of the Supreme Court of the State of New York, County of Queens – the court in which the Civil State Court Action was filed.

Conclusion

13. For the stated reasons, Clemens asks the court to remove the suit to the United States District Court for the Eastern District of New York, Brooklyn Division.

STEPTOE & JOHNSON LLP

By:



Evan Glassman
Michael C. Miller
750 Seventh Avenue
New York, New York 10019
(212) 506-3900

*Attorneys for Defendant
William Roger Clemens*

Of Counsel

Rusty Hardin

Joe Roden

Andy Drumheller

Derek Hollingsworth

Terry Kornell

RUSTY HARDIN & ASSOCIATES, PC

1401 McKinney Street, Suite 2250

Houston, Texas 77010

(713) 652-9000

Admission *Pro Hac Vice* will be Requested

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2009, a true and correct copy of the foregoing instrument was served upon all counsel of record via certified mail, return receipt requested, in accordance with the Federal Rules of Civil Procedure as follows:

Richard D. Emery
Debra Greenberger
Emery Celli Brinckerhoff & Abady, LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019

Earl Ward
75 Rockefeller Plaza, 20th Floor
New York, New York 10019

David R. Miller
David R. Miller, Attorney at Law, PLLC
2777 Allen Parkway, 7th Floor
Houston, Texas 77019



Robert Ajiashvili

200132008 AFFIDAVITS OF SERVICE (2) (Page 5 of 5)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

BRIAN G. McNAMEE,

Plaintiff

— 10 —

WILLIAM ROGER CLEMENS,

Defendant.

Index No. 29813-08

**SUMMONS
WITH NOTICE**

2009 APR -1 PM 1742

To The Above Named Defendant:

YOU ARE HEREBY SUMMONED to appear in this action by serving a notice of appearance on plaintiff within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete, if this summons is not personally delivered to you within the State of New York).

TAKE NOTICE that the nature of this action and the relief sought is to recover damages for libel, slander, intentional infliction of emotional distress, negligence, intentional tort, and prima facie tort, arising from statements defendant and defendant's agents published after the release of the Mitchell Report and that in the case of your failure to appear or answer, judgment will be taken against you by default for the sum of Ten Million Dollars (\$10,000,000), plus the fees, costs and disbursements of this action.

The basis for the venue designated is plaintiff's residence: Brian McNamee, 115 Rockaway Point Boulevard, Rockaway Pt, New York 11697.

Dated: December 12, 2008
New York, New York

BY:

Richard D. Emery
Debra L. Greenberger
Emery Cell Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, NY 10019
Telephone (212) 763-5000

Earl Ward
75 Rockefeller Plaza, 20th Floor
New York, NY 10019
Telephone (212) 763-5000

Attorneys for Plaintiff

QUEENS COUNTY CLERK
2009 APR -1 PM 11:42

04/21/2009 16:16 FAX 7182918787

29813/2009 SUMMONS WITH NOTICE (Page 3 of 3)

Y&S STATIONERY

003

Queens County Clerk's Office
Paym 1297200 12/12/2008 4:18p

Tr. 1552558	\$210.00
Other	
29813/2009 McNAMEE, BRIAN G. vs. C	
Total:	\$210.00
Check	\$210.00

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

BRIAN G. McNAMEE,

Plaintiff,

Index No. 29813-08

WILLIAM ROGER CLEMENS,

Defendant.

QUEENS COUNTY CLERK
FILED

2009 APR - 1 PM 1:41

AFFIDAVIT OF SERVICE

BEFORE ME, the undersigned authority, personally appeared Roxie Briggs of B&B Professional Process Service, who swore on oath that the following facts are true and correct:

"My name is Roxie Briggs, I am over the age of eighteen years, and of sound mind, I am not a party to or interested in the outcome of this cause. I am certified to serve process by the Supreme Court of Texas, No. SCH0238, to serve citation and other notices, that I have personal knowledge of every statement I herein make and I am fully competent to testify as to matters stated herein at the following dates and times.

On Thursday, March 19, 2009 at 9:45 a.m., I attempted service of the Summons with Notice to Mr. Clemens at his residence located at 11535 Quail Hollow Lane, Houston, Harris County, Texas 77024. Upon ringing the doorbell at the gate, I was advised by Mr. Clemens' housekeeper that Mr. Clemens was not in and that he and his wife Debbie were out of town. The housekeeper said that she did not know when they would return.

On Friday, March 20, 2009 at 11:40 a.m., I again attempted service of Mr. Clemens at his residence without success.

On Saturday, March 21, 2009 at 10:43 a.m. and again at 2:15 p.m., I returned to Mr. Clemens' residence for attempted service, again without success.

On March 23, 2009 at 1:33 p.m., I again attempted service on Roger Clemens at his residence. I was informed by the housekeeper that Mr. Clemens and his wife were still out of town, but the housekeeper opened the access gate to allow me to come up to the house. At that time, I was approached by Melvin Antunez who informed me that he is authorized to accept service on behalf of Mr. Clemens. Melvin Antunez called Roger Clemens' office from his cell phone and told Mr. Clemens' office of my service attempt to Mr. Clemens. Mr. Antunez then handed me his cell phone and I spoke to a

Diane at Mr. Clemens' office. She informed me that Melvin Antunez is an employee of Mr. Clemens' and is authorized to accept service on behalf of Roger Clemens at which time I handed Melvin Antunez a true and correct copy of this Summons with Notice." Melvin Antunez is a Spanish male, speaks English quite well, black hair, stands approximately 5'10" tall, weighs approximately 220 lbs. and looks to be in his early to middle 50's. Melvin Antunez also provided his signature for the receipt of service attached.

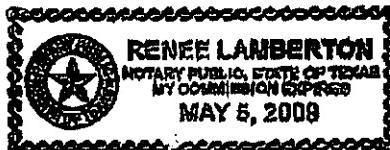
"I am not a party to this case, nor am I related to, employed by, or otherwise connected to any party or any party's attorney in this case; and I have no interest in the outcome of this lawsuit."

"I am over the age of 18 years, I am of sound mind and have never been convicted of a felony or misdemeanor involving moral turpitude."

Roxie Briggs
Roxie Briggs
B & B Professional Process Service

BEFORE Me, a notary public, on this day personally appeared Roxie Briggs, known to me to be the person whose name is subscribed to the foregoing document and, being by me first duly sworn, declared under oath that the statements therein contained are true and correct. Given under my hand and seal of office this 9th day of March, 2009.

Renee Lambertson
Notary Public



PLUMBERS COUNTY CLERK
APR - 1 PM 1:42
2009

04/21/2009 16:10 FAX 7182918767

Y&S STATIONERY

006

affidavit
Melvin Martinez

Dated: 3/23/09

2009 APR - 1 PM 11:48
QUEEN COUNTY CLERK

04/21/2009 16:16 FAX 7182918787

20813/2009 AFFIDAVITS OF SERVICE (2) (Page 4 of 6)

X&S STATIONERY

007
3SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

BRIAN G. McNAMEE,

Plaintiff,

Index No. 29813-08

against-

AFFIDAVIT OF SERVICE

WILLIAM ROGER CLEMENS,

Defendant.

I, Jess Lee, a Legal Assistant at Emery Celli Brinckerhoff and Abady LLP, hereby affirm under penalty of perjury that I am not a party to the action and over the age of eighteen years old and reside in the County of New York, New York.

On March 30, 2009, I caused the within **SUMMONS WITH NOTICE**, dated December 12, 2008, to be served upon the residence of the under-mentioned by First Class U.S. Mail by depositing same in an official depository for the U.S. mail with appropriate postage and bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the under-mentioned; and by Federal Express overnight delivery by placing the document listed above in a sealed Federal Express envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the under-mentioned and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal express agent for delivery upon:

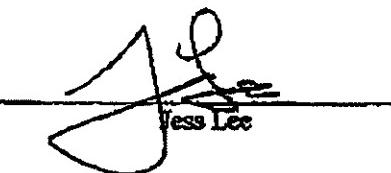
William Roger Clemens
11535 Quail Hollow Lane
Houston, Texas 77024
Defendant

Dated: New York, New York
March 30, 2009

Sworn To Before Me This
30th Day of March, 2009


NOTARY PUBLIC

WM140012U1867.WPD


Jess Lee

DIBBLE, GREENBERGER,
NOTARY PUBLIC-STATE OF NEW YORK
No. D20813/20119
Qualified in New York County
My Commission Expires November 14, 2011

2009 APR - 1 PM 1:42
QUEEN COUNTY CLERK
N.Y.C.

4

02/11/2008 12:41 7135791528

DAVID R MILLER

PAGE 07/32

Case 4:08-cv-00471 Document 1 Filed 02/11/2008 Page 1 of 26

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM ROGER CLEMENS

Plaintiff

VS.

BRIAN McNAMEE

Defendant

CIVIL ACTION

NO. 08-471

DEFENDANT BRIAN McNAMEE'S NOTICE OF REMOVAL

Introduction

1. Plaintiff is William Roger Clemens, hereinafter "Clemens." Defendant is Brian McNamee, hereinafter "McNamee."

2. On January 7, 2008 *Clemens* sued *McNamee* for defamation in the 129th Judicial District Court of Harris County, Texas.

3. Pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(b), and in compliance with 28 U.S.C. § 1446 and Local Rule 81, *McNamee* timely removes the following civil state court action to the United States District Court for the Southern District of Texas, Houston Division: No. 2008-00703, *William Roger Clemens v. Brian McNamee*, in the 129th Judicial District Court of Harris County, Texas (hereinafter the "Civil State Court Action").

4. Removal to the United States District Court for the Southern District of Texas, Houston Division, is proper because:

- (i) *Clemens* is and was a citizen of Texas at the time of this removal and at the time this case was filed;
- (ii) *McNamee* is and was a citizen of New York at the time of this removal and at the time this case was filed;

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DAVID R MILLER

PAGE 08/32

Case 4:08-cv-00471 Document 1 Filed 02/11/2008 Page 2 of 26

- (iii) the district courts of the United States have original subject matter jurisdiction (diversity) of this action because: (a) this is a civil action between citizens of different states; and (b) the matter in controversy exceeds the sum or value of \$75,000.00 exclusive of interest and costs. Diversity jurisdiction exists and existed both at the time of this removal and at the time this case was filed;
- (iv) This notice of removal is being filed within 30 days after *McNamee* was served with process and a copy of the initial pleading in this case (*Clemens' Original Petition*); and
- (v) the United States District Court for the Southern District of Texas, Houston Division, is the district court of the United States for the district and division embracing the place where the *Civil State Court Action* was filed.

28 U.S.C. § 1332(a); 28 U.S.C. § 1441(a); 28 U.S.C. § 1441(b); 28 U.S.C. § 1446(a); 28 U.S.C. § 1446(b).

Statement Of Grounds For Removal

A. Civil Action Between Citizens Of Different States

5. *Clemens* is a citizen of Texas at the time of this removal and was a citizen of Texas at the time this case was filed. *Exhibit 1, Plaintiff's Original Petition*, p. 3. *McNamee* is and was a citizen of New York at the time of this removal and was a citizen of New York at the time this case was filed. Therefore, there is complete diversity of citizenship between the parties. 28 U.S.C. § 1332(a).

B. Matter In Controversy Exceeds \$75,000.00 Exclusive Of Interest And Costs

6. *Clemens* is plainly seeking in excess of \$75,000.00 from *McNamee* exclusive of interest and costs. This is a case of alleged defamation. Clemens is a famous Major League Baseball pitcher. Clemens alleges that McNamee falsely stated to the "Mitchell Commission" that Plaintiff used steroids and human growth hormones during his professional baseball career. Clemens claims that McNamee "injured Clemens' reputation and exposed him to public hatred, contempt, ridicule and financial injuries." *Id* Exhibit 1, p.12. Clemens alleges that his "good
(ECBA\LLP\1591\100003907.DOC)

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DAVID R MILLER

PAGE 09/32

Case 4:08-cv-00471 Document 1 Filed 02/11/2008 Page 3 of 26

reputation has been severely injured" and that the alleged defamation has caused "Clemens to suffer mental anguish, shame, public humiliation and embarrassment." *Id.* at 13.

7. It is apparent from the face of *Clemens'* original petition that Clemens is seeking a sum or value exceeding \$75,000.00 exclusive of interest and costs from *McNamee*.

C. Original Subject Matter Jurisdiction Pursuant To 28 U.S.C. § 1332(a)/Removal Proper Pursuant To 28 U.S.C. §§ 1441(a) And 1441(b)

8. Because this civil action is between citizens of different states and the matter in controversy exceeds \$75,000.00 exclusive of interest and costs, district courts of the United States have original subject matter jurisdiction of this action. 28 U.S.C. § 1332(a). *Exhibit 1, Plaintiff's Original Petition*, p. 3. Thus, removal is proper under 28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(b).

Timely Removal

9. *Clemens'* original petition is the initial pleading in this case. This notice of removal is being filed on February 11, 2008 – less than 30 days after *McNamee* was served with process and a copy of *Clemens'* original petition. Thus, this notice of removal is timely. 28 U.S.C. § 1446(b).

Attachments

10. Pursuant to 28 U.S.C. § 1446(a) and Local Rule 81, *McNamee* attaches copies of the following:

- Exhibit 1: *Clemens'* original petition (*Exhibit 1*) which is the only pleading filed in the *Civil State Court Action*;
- Exhibit 2: Order Granting Motion for Substituted Service of Process from the *Civil State Court Action*;
- Exhibit 3: the docket sheet from the *Civil State Court Action*;
- Exhibit 4: an index of matters being filed; and

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DAVID R MILLER

PAGE 18/32

Case 4:08-cv-00471 Document 1 Filed 02/11/2008 Page 4 of 26

Exhibit 5: a list of all counsel of record, including addresses, telephone numbers, and parties represented.

11. The judge has signed no other orders in the *Civil State Court Action*.

Notice To Adverse Parties/Filing With Clerk Of State Court

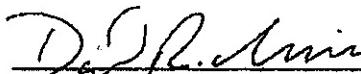
12. Pursuant to 28 U.S.C. § 1446(d) and promptly after the filing of this notice of removal, *McNamee* is giving written notice of this notice of removal to all adverse parties, and *McNamee* is filing a copy of this notice of removal with the clerk of the 129th Judicial District Court of Harris County, Texas—the court in which the *Civil State Court Action* was filed.

Conclusion

13. For the stated reasons, *McNamee* removes the Civil State Court Action to the United States District Court for the Southern District of Texas, Houston Division.

Respectfully Submitted,

DAVID R. MILLER, ATTORNEY AT LAW, PLLC
2777 Allen Parkway, 7th Floor
Houston, Texas 77019
(713) 579-1568
FAX: (713) 579-1528


DAVID R. MILLER
Federal ID No. 7066, State Bar No. 14067500
Attorney in Charge for Defendant
Brian McNamee

OF COUNSEL:

Richard D. Emery (RE 5181)
Dobra Greenberger (DG 5159)
Emory Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, NY 10019
(212) 763-5000

{ECBA LLP\15911\00003907.DOC}

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DAVID R MILLER

PAGE 11/32

Case 4:08-cv-00471 Document 1 Filed 02/11/2008 Page 5 of 26

FAX (212) 763-5001
Admission Pro Hac Vice will be Requested

Earl Ward (EW 2875)
75 Rockefeller Plaza, 20th Floor
New York, NY 10019
(212) 763-5070
FAX (212) 763-5001
Admission Pro Hac Vice will be Requested

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February 2008, a true and correct copy of the foregoing instrument was served upon all counsel of record in accordance with the Federal Rules of Civil Procedure, *to-wit*:

Rusty Hardin
Derek Hollingsworth
Andy Drumheller
Joe Roden
Terry Kornell
Rusty Hardin & Associates, P.C.
1401 McKinney, Suite 2250
Houston, Texas 77010
(713) 652-9000
(713) 652-9800 (facsimile)



David R. Miller